

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Barry Michaels,

Plaintiff,

vs.

Florida Coastal School of Law,

Defendant.

Case No.: 2:15-cv-0642-GMN-NJK

ORDER

Pending before the Court is Defendant Florida Coastal School of Law's Motion to Dismiss, (ECF No. 7), to which *pro se* Plaintiff Barry Michaels responded in opposition, (ECF No. 13).¹ For the reasons stated herein, the Court will grant Defendant's Motion and dismiss this case for lack of subject matter jurisdiction.²

I. BACKGROUND

This action centers upon allegations that Defendant incorrectly administered a multiple-choice exam and thereby prevented Plaintiff from admission to Defendant's law school. (Compl., ECF No. 1). Specifically, Plaintiff alleges that he enrolled in Defendant's online pre-admission program in January 2014. (*Id.* ¶¶ 9-11). The terms of

¹ In light of Plaintiff's status as a *pro se* litigant, the Court has liberally construed his filings, holding them to standards less stringent than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

² *Pro se* Plaintiff also filed a Motion to Strike, (ECF No. 13), claiming that the Court should not consider the Motion to Dismiss because Defendant's counsel had not received authorization to practice in this district prior to filing the Motion. However, because the Motion to Dismiss was Defendant's counsel's first filing in this case, and because the Motion contained the statement of compliance required by Local Rule IA 10-2, the Court finds that it was properly filed. Accordingly, *pro se* Plaintiff's Motion to Strike will be denied.

1 this pre-admission program provided that any student who, *inter alia*, obtained a grade of
2 2.0 or higher in two five-week courses would be admitted to Defendant's full-time J.D.
3 program. (*Id.* ¶ 15).

4 During one of his final exams, Plaintiff alleges that a printed test booklet given to
5 him by Defendant listed the exam questions in a different order than his online answer
6 sheet. (*Id.* ¶ 23). Plaintiff claims that this discrepancy caused him to lose time on the
7 exam, and resulted in his failing the course. (*Id.* ¶¶ 31-32). Subsequently, Plaintiff was
8 denied admission to Defendant's law school. (*Id.* ¶ 37).

9 Based on these allegations, Plaintiff filed a small claims complaint in Las Vegas
10 Justice Court on January 12, 2015. (Ex. 1 to Def.'s Mot. pp. 9-13, ECF No. 7). On the
11 first page of his small claims complaint, Plaintiff stated that he was damaged in the
12 amount of \$7,500. (*Id.* p. 9). On March 4, 2015, the Las Vegas Justice Court dismissed
13 Plaintiff's small claims complaint for lack of proper service. (Ex. 2 to Def.'s Mot. p. 18,
14 ECF No. 7).

15 On April 7, 2015, Plaintiff filed the Complaint in this case, which is based upon
16 the same allegations as Plaintiff's small claims complaint. The Complaint sets forth
17 causes of action for (1) negligence, (2) breach of contract, (3) fraud, and (4) intentional
18 infliction of emotional distress. (Compl. ¶¶ 39-56). The Complaint does not state an
19 amount that Plaintiff seeks to recover for his alleged injuries.

20 **II. LEGAL STANDARD**

21 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for
22 lack of subject matter jurisdiction. "A party invoking the federal court's jurisdiction has
23 the burden of proving the actual existence of subject matter jurisdiction." *Thompson v.*
24 *McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A motion to dismiss for lack of subject
25 matter jurisdiction pursuant to Rule 12(b)(1) may take one of two forms. *Thornhill*

1 *Publ'g Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It may be a
2 “facial” challenge or it may be a “factual” challenge. *Id.* “In a facial attack, the
3 challenger asserts that the allegations contained in a complaint are insufficient on their
4 face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
5 (9th Cir. 2004).

6 Alternatively, “A factual challenge relies on affidavits or any other evidence
7 properly before the court to contest the truth of the complaint’s allegations.” *Courthouse*
8 *News Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014). When a factual challenge is
9 asserted, the Court need not presume the truthfulness of the allegations in the complaint.
10 *See Meyer*, 373 F.3d at 1039; *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “Once
11 the moving party has converted the motion to dismiss into a factual motion by presenting
12 affidavits or other evidence properly brought before the court, the party opposing the
13 motion must furnish affidavits or other evidence necessary to satisfy its burden of
14 establishing subject matter jurisdiction.” *Savage v. Glendale Union High Sch.*, 343 F.3d
15 1036, 1040 (9th Cir. 2003).

16 “District courts have jurisdiction in civil actions where there is complete diversity
17 of citizenship among the parties and the amount in controversy exceeds \$75,000,
18 exclusive of interest and costs.” *See Crum v. Circus Circus Enterprises*, 231 F.3d 1129,
19 1131 (9th Cir. 2000) (citing 28 U.S.C. § 1332(a)). “To justify dismissal, it must appear to
20 a legal certainty that the claim is really for less than the jurisdictional amount.” *Budget*
21 *Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997) (citing *St. Paul*
22 *Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)).

23 **III. ANALYSIS**

24 In its Motion to Dismiss, Defendant claims that it is evident both from the face of
25 the instant Complaint and from Plaintiff’s previous small claims complaint that the

1 amount in controversy does not exceed \$75,000. Indeed, the Complaint in this action
2 fails to assert any particular amount which Plaintiff believes he is entitled to recover.
3 Furthermore, the small claims complaint, which Plaintiff affirmed under penalty of
4 perjury, stated that Defendant owed Plaintiff only \$7,500. (Small Claims Complaint, Ex.
5 1 to Def.'s Mot. p. 9, ECF No. 7).

6 Without offering any supporting evidence, Plaintiff contends that the amount-in-
7 controversy requirement is satisfied in this case, and states he previously claimed to have
8 suffered only \$7,500 in damages because that was the maximum amount allowed
9 pursuant to the jurisdictional rules of the Las Vegas Justice Court. (Pl.'s Resp. ¶¶ 9-10,
10 ECF No. 13). Plaintiff also points out that the cover sheet submitted with his Complaint
11 in this action states that he is seeking \$75,000. (Cover Sheet, ECF No. 1-1). However,
12 the Court need not assess Plaintiff's prior sworn statement that his damages are only
13 \$7,500 or the cover sheet's indication that Plaintiff has been damaged in the exact
14 amount of \$75,000, because neither of these values *exceeds* \$75,000, which is required
15 for the Court to exercise jurisdiction. *See, e.g., Crum*, 231 F.3d at 1131. Therefore,
16 because the Complaint is silent as to the amount of damages at issue, and all of the
17 evidence in the record indicates that Plaintiff has not suffered damages in excess of
18 \$75,000, the Motion to Dismiss will be granted.³

19 CONCLUSION

20 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss, (ECF No. 7), is
21 **GRANTED.**

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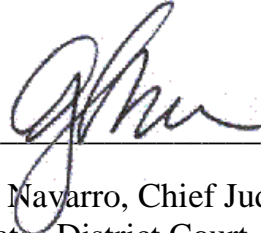
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25 ³ Because Plaintiff has failed to carry his burden as to the amount in controversy, the Court need not determine whether complete diversity exists between Plaintiff and Defendant.

1 **IT IS FURTHER ORDERED** that *pro se* Plaintiff's Motion to Strike, (ECF No.
2 13), and Motion for Default Judgment, (ECF No. 14), are **DENIED**. The Clerk shall
3 enter judgment accordingly and close the case.
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5 **DATED** this 11th day of September, 2015.

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Gloria M. Navarro, Chief Judge
United States District Court